

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ALLSTATES REFRACTORY,
CONTRACTORS, LLC,

Case No. 3:21-CV-01864

Plaintiff,

Toledo, Ohio

vs.

WEDNESDAY, JUNE 29, 2022

MARTIN J. WALSH, et al.,

Defendants.

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TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE JACK ZOUHARY
SENIOR UNITED STATES DISTRICT JUDGE

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1 **WEDNESDAY, JUNE 29, 2022**

2 (Proceedings commenced in open court at 10:15 a.m.)

3 THE COURT: Good morning. We are here on
4 case number 21-CV-1864, Allstates Refractory Contractors,
5 L.L.C. versus Martin J. Walsh, et al. This matter is
6 before me today for a hearing on cross motions, and those
7 motions are reflected on our docket. And in a response to
8 those briefings, we submitted some questions for the
9 hearing as well, which are on the docket. And in response
10 to a request from the Court, we also received a Notice of
11 Authorities from the plaintiff, which is reflected on the
12 docket as well.

13 What we'll do, as I indicated to counsel, is
14 use the questions that we sent out as a starting point, and
15 if history is any indicator, we will be varying from that
16 and getting through it, but not exactly as presented,
17 perhaps. And I will, of course, let counsel have the
18 opportunity to respond to the questions and also present
19 what they have to offer for the Court that's not already in
20 their briefing.

21 So, with that, let's start with question
22 number one. And the question is set forth on the docket,
23 so I won't necessarily repeat it verbatim. The question
24 deals with whether this case is a pre-enforcement action
25 under 655(f), and how this case may be different from the

1 *Elgin* case.

2 MR. SHUMATE: Your Honor, would you like me
3 to take the podium or stand?

4 THE COURT: Oh, I forgot to tell you about
5 that. You can do whatever is comfortable for you. I have
6 no problem with you sitting, no problem with you having
7 your notes in front of you. The only thing I ask is that
8 you be close enough to the microphone so that I can hear
9 and others can hear. And to know whether the microphone is
10 on, you look for the word "push", and if the red light is
11 lit, a bit counterintuitive, it means it's on. If the red
12 light is off, then it's not.

13 MR. SHUMATE: Thank you, Your Honor.

14 May it please the Court: I think my audio
15 is on. Brett Shumate for the plaintiff.

16 So in answer to your first question, Your
17 Honor, no, this is not a pre-enforcement action under
18 Section 655(f). And this case is also different than
19 *Elgin*, and I'll address both parts of the Court's question.

20 So this is not a pre-enforcement case under
21 Section 655(f) because Allstates is not challenging the
22 validity of any OSHA standard or asking the Court for a
23 judicial review of any OSHA standard.

24 THE COURT: So does 65 -- I'm sorry, 655(f)
25 have any role in this case?

1 MR. SHUMATE: Not in this case, Your Honor.
2 It plays an important role in other cases, but not in this
3 case.

4 I think it would be helpful if we just turn
5 to the language of the statute, because the statute
6 mentions the word "standard" five times. It says, "Any
7 person who may be adversely affected by a standard issued
8 under this section may, at any time prior to the sixtieth
9 day after such standard is promulgated, file a petition
10 challenging the validity of such standard with the United
11 States Court of Appeals." And it goes on, "for a judicial
12 review of such standard."

13 So Allstates in this case is not claiming to
14 be aggrieved by any standard. We are claiming be to be
15 aggrieved by the statute. We are not asking for a judicial
16 review of any standard. Instead, the nature of our case is
17 a challenge to the validity of a federal statute, Section
18 (6) (b) of the OSH Act, that we claim exceeds Congress's
19 power under the Constitution.

20 It's important to clarify what we are not
21 challenging in this case. We are not asking the Court to
22 review the validity of any OSHA standard. We are not
23 challenging any enforcement action. We are not seeking to
24 preempt any enforcement action. We are not claiming that
25 OSHA committed any error at all, and we are not using our

1 constitutional argument as a vehicle to attack any OSHA
2 standard.

3 So, in short, we are challenging the
4 validity of Congress's delegation of legislative authority
5 to OSHA, not OSHA's exercise of that authority.

6 THE COURT: All that leading to your
7 conclusion that I have jurisdiction to hear this case.

8 MR. SHUMATE: Yes, Your Honor. You have
9 jurisdiction to the federal question statute for the same
10 reason that the district court in the *Free Enterprise Fund*
11 case had jurisdiction to consider a similar separation of
12 powers challenge to a different federal statute.

13 THE COURT: Let me pause you and give the
14 other side a chance to counter.

15 Why are we even talking about 655(f)?

16 MR. AVALLONE: Good morning, Your Honor.
17 Zachary Avallone for defendants here.

18 And, in fact, I would go back to exactly
19 what plaintiff's counsel began with, and that's the text of
20 the statute. And I think that's critically important here,
21 and I think that's what differentiates this case from *Free*
22 *Enterprise*.

23 So going back to the text of the statute, it
24 begins with who it covers. And it starts with, "Any person
25 who may be adversely affected by a standard issued under

1 this section." I'm going to pause there for a moment. The
2 only reason plaintiffs have alleged standing in this case
3 is because they are -- they claim to be adversely affected
4 by standards that were promulgated, that they claim, under
5 an unconstitutional statute. So for that first part,
6 plaintiffs are covered and the type of individual, the type
7 of entity that 655(f) covers.

8 Going on, it says, "It may, at any time
9 prior to the sixtieth day of such standards promulgated,
10 file a petition challenging the validity of such standard."
11 And here, Your Honor, that's exactly what they are doing.
12 They are challenging the validity of standards, and the
13 theory that they are challenging under is a
14 constitutional -- unconstitutionality. And so just because
15 that they have claimed that the standards are invalid makes
16 it a facial constitutional attack does not bring it outside
17 the realm of the statute.

18 And the reason we know that is if you take a
19 look at what Justice Thomas did in *Elgin*. He looked at the
20 language of the statute. And the plaintiffs in that case
21 made a similar argument. They said that even if their
22 claims could be somehow related to the text of the statute,
23 they were bringing something different. They were bringing
24 as applied constitutional challenge to something that is
25 different than the adverse action and --

1 THE COURT: Let me pause you.

2 MR. AVALLOONE: Sure.

3 THE COURT: You'll get a chance to finish,
4 but what do you disagree with with what he has said so far?

5 MR. SHUMATE: Yes, Your Honor. I disagree
6 for three reasons.

7 First, let's look at the text, and we'll
8 walk it through. "Any person who may be adversely affected
9 by a standard." So you, Mr. Avallone, talked about
10 standing. I would point you to paragraph 109 of our
11 complaint, where we allege, "Allstates' injuries are
12 traceable to the legislative delegation of power in Section
13 6(b) of the OSH Act. In the absence of Congress's
14 delegation of legislative authority to the Secretary in
15 Section 6(b)," we go on to explain how Allstates would have
16 no injury at all. So our injury, pursuant to statute, is
17 traceable to the statute, not any OSHA standard.

18 Second, under 655(f), the nature of the
19 challenge is directed to the validity of the OSHA standard.
20 In this case, we are not challenging the validity of any
21 standard. What that means is, in a typical case, OSHA
22 promulgates a new standard, and parties who are adversely
23 affected by that new standard have an opportunity to file a
24 petition for review and the types of arguments they make
25 are that OSHA's standard exceeds OSHA's authority, OSHA

1 acted arbitrarily and capriciously. There is not
2 substantial evidence in the record. We are not making any
3 of those arguments here. There is no argument from
4 Allstates that OSHA committed any error at all, because
5 what we are doing is claiming that Congress committed the
6 error by delegating too much legislative authority to the
7 agency just like the claims in the *Free Enterprise Fund* and
8 the *Time Warner* case that we cited as well. So the
9 nature --

10 THE COURT: So if they are correct that
11 their challenge is and their dispute is with Congress and
12 not necessarily with OSHA, how else are they to pursue this
13 claim?

14 MR. AVALONE: Well, Your Honor, once again,
15 going back to the text of the statute, the text does not
16 differentiate as to who made the error that they are
17 claiming. It doesn't exclusively apply to whether OSHA
18 makes the error, whether Congress makes the error, or
19 someone else makes the error.

20 And that is what was dispositive in *Elgin*,
21 because what happened in *Elgin* was the individuals
22 challenged the constitutionality of the Selective Service
23 statute and said that it violated the Constitution. But
24 what the court looked at is they looked at that statute,
25 which they said they were challenging on a facial basis,

1 and said how does it actually apply to the individuals in
2 this case. And they said the only reason that it applies
3 is because they were federal workers. And the way that
4 that challenge passed through and applied to them was
5 through a -- their employment, and challenging that
6 funneling to those plaintiffs could only be made under the
7 CSRA.

8 Taking that to this case, here, the only
9 reason why Allstates can even challenge the standards to
10 begin with is because OSHA promulgated standards pursuant
11 to what plaintiffs claim is an unconstitutional statute.
12 If OSHA never promulgated any statutes at all, Allstates
13 wouldn't have standing. It would be an hypothetical
14 academic dispute. The only reason we are here today is
15 because OSHA exercised that authority and actually issued
16 those standards. And if Allstates wanted to challenge in a
17 pre-enforcement context those standards, the proper
18 mechanism was through 655(f).

19 And setting that aside, Allstates had the
20 opportunity in an actual enforcement action to bring the
21 same challenges back in 2019, and that's through a separate
22 section, which also does not flow to the district court.
23 So they had the opportunities to make these arguments and
24 to bring these challenges to the standards, and because
25 those standards are how that supposedly unconstitutional

1 statute actually applies to the plaintiffs here, that is
2 why it flows through 655(f) or the alternative enforcement
3 standard.

4 THE COURT: So what's wrong with the flow
5 through argument and the *Elgin* case? How does *Elgin* get
6 distinguished, I guess, by you?

7 MR. SHUMATE: Your Honor, *Elgin* is an
8 important case, but I think it's important because it
9 highlights how that case is different than the case we are
10 bringing here. We are a lot more like *Free Enterprise*.

11 In *Elgin*, Justice Thomas was very clear.
12 The plaintiffs were challenging the agency's decision and
13 the validity of the agency's decision, which was the
14 adverse employment actions with a discharge of the federal
15 employees. And the way that the plaintiffs were attacking
16 the validity of the agency's decision was by challenging
17 the constitutionality of the federal statute, the Selective
18 Service Act, that required the men to register for the
19 draft. And so they were arguing that was an
20 unconstitutional basis for their discharge from federal
21 employment. Court said, okay, when you are challenging the
22 validity of the agency's decision but you have a
23 constitutional claim that attacks the agency's decision,
24 that, like *Thunder Basin*, needs to be brought through the
25 enforcement mechanism, which, in this case, would be

1 analogous to a different statute, Section 660(a), which the
2 government can see is not applicable. This is not an
3 enforcement context.

4 The way -- another way this case is
5 different, unlike the plaintiffs in *Elgin*, we are not
6 challenging the validity of anything the agency has done.
7 We are bringing a facial separation of powers challenge to
8 the validity of a federal statute just like the plaintiffs
9 in the *Free Enterprise Fund* and the just like the
10 plaintiffs in the *Time Warner* case, which preceded the *Free*
11 *Enterprise Fund*. So *Elgin* is just very different. The
12 nature of the claim is different.

13 And I think *Free Enterprise Fund* answers
14 your previous question as well, Your Honor, which is where
15 would we go to bring this claim, and the answer is nowhere.
16 There is no new standard that Allstates could challenge in
17 the Court of Appeals to bring this claim. And *Free*
18 *Enterprise Fund* said, look, it's really an odd procedure to
19 think that Congress would have wanted a plaintiff to select
20 a standard at random and, you know, to bring a facial
21 constitutional challenge to a statute. And Allstates
22 shouldn't have to bet the farm by violating a standard and
23 waiting for an enforcement action to bring this argument.

24 THE COURT: So is it the Government's
25 position that you have to attack a standard in order to

1 attack a constitutionality?

2 MR. AVALONE: Well, Your Honor, in this
3 particular instance, because they are challenging the
4 validity of standards, the answer would be yes.

5 THE COURT: Well, what if they weren't? If
6 there was another constitutional challenge, would you
7 necessarily have to be attacking the standard? Give me an
8 example, if you can.

9 MR. AVALONE: Well, Your Honor, we talked a
10 little bit about this in our brief how there is a
11 distinction between when you are challenging OSHA standards
12 and OSHA regulations, and because, if you are challenging
13 standards, Congress has set forth an exclusive regime that
14 needs to be followed that goes through one path. But if
15 folks are bringing something different, challenging
16 regulations that are not standards, part of OSHA, they are
17 not subject to this jurisdictional challenge.

18 And really, it comes back down to the text
19 of the statute. And that's why *Free Enterprise Fund* is not
20 particularly helpful here and is inapplicable, because if
21 you look at the text of that statute, the exclusive regime
22 that was at play there was for persons aggrieved by a final
23 order of the Securities Exchange Commission or a person
24 adversely affected by a rule of the Commission. Those were
25 the two things that they -- that Congress set out that

1 needed to follow that exclusive regime.

2 The plaintiffs in *Free Enterprise* were
3 actually challenging something different. They were
4 challenging a separate board, the validity of the existence
5 of the board itself. And that challenge was not
6 encapsulated by a final order of the Commission or a rule
7 of the Commission. And it wasn't just they were
8 challenging the rules. They were challenging every single
9 thing that board did, whether it was an investigation,
10 whether it was issuing an unfavorable report.

11 And the unfavorable report is particularly
12 important in that case, because that is what the plaintiffs
13 in *Free Enterprise* said that actually caused them harm.
14 And when the court looked at Section 78(y), they didn't see
15 anything about a final report. And so they said if this
16 entity cannot challenge an unfavorable report and they are
17 being harmed by it, there was no avenue for pre-enforcement
18 review for that type of report, and if they got the report,
19 there was no way for them to actually bring any challenge
20 at all. And so what the court was doing in *Free Enterprise*
21 and what they were describing was actually a textual
22 analysis, and said, if -- if this type of claim does not or
23 actually fell within what Congress had set out, then there
24 would be no avenue for review.

25 It's different than here, because there is

1 avenues for review, as we talked about. They could have
2 brought a pre-enforcement review to the standards, and if
3 there is an actual enforcement action, then they can
4 challenge it like that. But, in the SEC, the report itself
5 and the authority to issue the report was what was at
6 issue. And if Congress interpreted Sections 78(y) as, the
7 text there, as including something like a report, then
8 there would be no avenues for judicial review at the
9 pre-enforcement or post-enforcement.

10 MR. SHUMATE: Your Honor, *Free Enterprise*
11 *Fund* is squarely on point. In that case, the plaintiffs
12 were bringing a facial separation of powers challenge to
13 the Sarbanes-Oxley Act. In this case, likewise, we are
14 bringing a facial separation of powers challenge to the OSH
15 Act.

16 THE COURT: Hold on one second, please.

17 DEPUTY CLERK: We are having trouble
18 hearing.

19 THE COURT: Get closer perhaps.

20 (Brief pause.)

21 MR. SHUMATE: I apologize.

22 Our case is squarely on point with *Free*
23 *Enterprise Fund*. In that case, the plaintiff was bringing
24 a facial separation of powers challenge to a federal
25 statute, the Sarbanes-Oxley Act. In this case, likewise,

1 we are bringing a facial separation of powers challenge to
2 a federal statute.

3 In *Free Enterprise Fund*, the court first
4 held that the statute at issue in that case, 78(y), did not
5 explicitly bar the district court from exercising
6 jurisdiction. So too here, we do not fall within the plain
7 terms of the statute. And second, the court looked at
8 whether 78(y) implicitly barred district court jurisdiction
9 and walked through the Thunder Basin factors, which we'll
10 get to in a minute.

11 But I think it's important to think what was
12 the relief that was being requested in *Free Enterprise*
13 *Fund*. They were not challenging the enforcement action.
14 The plaintiffs were challenging the statute. They were
15 seeking relief against the board because of the
16 unconstitutionality of the statute. And they sought an
17 injunction that would prevent the board from exercising the
18 power that Congress had granted to the board.

19 So, too, here. We are asking the Court for
20 a declaratory judgment that the statute is unconstitutional
21 and an injunction that prevents OSHA from enforcing the
22 statute, not any particular standards. So we think *Free*
23 *Enterprise Fund* is squarely on point.

24 THE COURT: Are you asking to bar the
25 enforcement of any aspect of the statute?

1 MR. SHUMATE: Yes, Your Honor. We have
2 asked for an injunction that would prevent OSHA from
3 enforcing the statute, and, in particular to our complaint,
4 we've pointed to Section 5(a)(2) and Section 17 of the OSH
5 Act. This is at paragraphs 114 and 115 of the complaint.
6 Those are the provisions of the OSH Act that, number one,
7 require Allstates to comply with OSHA's safety standards.
8 And Section 17 authorizes OSHA to impose penalties against
9 employers like Allstates that fail to comply.

10 THE COURT: So are you asking the Court to
11 preclude OSHA from enforcing any other standards or
12 citations they issued? Anything that happened in the past
13 before the date of this Court order?

14 MR. SHUMATE: No, Your Honor. Our request
15 for relief is purely prospective. Declaratory judgment is
16 prospective, entering injunction is prospective in that it
17 would prevent OSHA in the future from enforcing the
18 statute.

19 THE COURT: We have somebody on?

20 DEPUTY CLERK: Hang on one second.

21 THE COURT: Okay.

22 So what would happen to a pending citation
23 that was being disputed at the time I issue an order, would
24 that put a halt to that particular matter?

25 MR. SHUMATE: I believe it would, Your

1 Honor, to the -- if OSHA had already taken the enforcement
2 action, I think the penalty would remain in place to the
3 extent that OSHA had already enforced the statute. At that
4 point, the employer could review administratively within
5 the Department of Labor, so I don't think the injunction
6 would affect a pending challenge to a citation that had
7 been issued prior to any injunction the court issues.

8 But with respect to the plaintiff in this
9 case, there is no -- we are not challenging any past
10 enforcement or citation. There is nothing pending against
11 Allstates, the plaintiff in this case.

12 THE COURT: So what would have happened if
13 your client did get a citation, and as part of that, it
14 chose to challenge not only the citation but the
15 constitutionality of the statute? Would that end up in
16 district court or elsewhere?

17 MR. SHUMATE: Likely not, would not end up
18 in district court. I think the government's position would
19 be that, in that case, would be a lot like *Elgin*, because
20 all -- if there were an enforcement action and Allstates
21 wanted to challenge the validity of that enforcement action
22 on the basis that the statute is unconstitutional,
23 Allstates would have to do that through the procedures
24 under Section 660(a), which governs a judicial review
25 enforcement. And that, the government has said that, that

1 scheme is not at issue in this case. But that ultimately
2 would go to the Court of Appeals, not federal district
3 court.

4 THE COURT: So it seems to me that if
5 someone, generally speaking, is challenging the
6 constitutionality of the statute, a facial challenge, that
7 ought to start at district court, not be brought into a
8 federal appellate court or elsewhere. It certainly
9 wouldn't be something OSHA would tackle, right?

10 Yes?

11 MR. AVALONE: Your Honor, I assume you are
12 looking at me?

13 THE COURT: I am.

14 MR. AVALONE: Okay. So I think that
15 there's -- there's two points there. If you take a step
16 back.

17 THE COURT: There are.

18 MR. AVALONE: Take a step back. If you
19 focus on the relief that Allstates is seeking, Allstates is
20 asking the Court, and, if I heard correctly, to hold
21 invalid all of the safety standards that were issued under
22 the statute that they've claimed as unconstitutional.

23 THE COURT: Is that what you are asking?

24 MR. SHUMATE: No, Your Honor. We are asking
25 for an injunction that says that Allstates doesn't have to

1 comply with the statute because OSHA can't take enforcement
2 action under the statute.

3 MR. AVALLONE: And, Your Honor, it sounds
4 like that's a preenforcement challenge. If you just take a
5 look at what they are practically asking for, they are not
6 challenging an enforcement, they are asking -- they are
7 coming into this Court before enforcement is taking place,
8 asking for an injunction to stop future enforcement based
9 on these standards. That's a pre-enforcement challenge.

10 And if you take a look at the scope of
11 relief requested, here, as we are just talking about, they
12 are challenging the statute that allows OSHA to issue
13 certain safety standards. If you take a look at what they
14 were challenging in *Free Enterprise* is different. They
15 were challenging the existence of the board. They were
16 challenging the ability of that board to investigate, to
17 issue citations, to issue reports.

18 Here, if plaintiffs get everything that they
19 want, OSHA is going to continue doing inspections. They
20 are going to continue issuing citations. They are going to
21 continue doing everything else that they are already
22 authorized to do. The only thing that's going to be
23 stopped and enjoined is the small sliver of standards,
24 safety standards, that plaintiffs have challenged.

25 And that's the difference between this case

1 and *Free Enterprise*. And that's why this case is more like
2 *Thunder Basin* and *Elgin*, where, what they are actually
3 asking for, the practical effect of what they are seeking,
4 it falls within that exclusive regime and within the text
5 of that statute.

6 And so, Your Honor, to bring it back to your
7 original question was if they were bringing a question of
8 unconstitutionality, shouldn't it be brought in federal
9 court. Well, if they brought a proper pre-enforcement
10 action, which Congress said if you are going to challenge
11 the validity of standards, there is a time. It's a window.
12 We have to bring it within 60 days. It does go through
13 federal court. It goes through Federal Court of Appeals.
14 And it's the way -- the way that Congress set that up is to
15 jump start and make sure there is Court of Appeal's review
16 quickly and, if necessary, that they are on their way to
17 the Supreme Court. Because uniformity in national
18 standards, if you take a look back at what Congress was
19 discussing when they were passing the OSH Act, uniformity
20 in national standards was very important. And they did not
21 want to have piecemeal injunctions in many different
22 districts around the country. They wanted to fast track
23 these sorts of rules so they could get reviewed and applied
24 uniformly on a national level.

25 THE COURT: But they are not asking for a

1 piecemeal evaluation of a past standards, are they? They
2 are not asking that it be different in one place or
3 another. They are saying the whole thing is improper
4 because there is not the proper -- there was the improper
5 delegation of authority by Congress to OSHA. That's
6 different.

7 MR. AVALONE: Well, Your Honor, I don't
8 think -- I don't think it necessarily is different because,
9 Your Honor, if let's say that they have brought -- a
10 different entity brought a different challenge in a
11 different district court and that district court ruled in a
12 way that was different than you ultimately rule. At that
13 point, then, OSHA is facing conflicting injunctions across
14 the country and that was a situation that Congress was
15 trying to avoid by fast-tracking review of standards into
16 the Court of Appeals.

17 THE COURT: So you keep taking about
18 standards, the other side keeps talking about the statute.
19 I'll let you comment on what you just heard.

20 MR. SHUMATE: Your Honor, my friend
21 mentioned practical effects. Really, I think let's go back
22 to the relief in *Free Enterprise Fund*. This is page 487 of
23 the opinion. The plaintiffs in that case were seeking,
24 quote, a declaratory judgment that the board is
25 unconstitutional and an injunction preventing the board

1 from exercising its powers, end quote. Preventing the
2 board from exercising its powers meant that, as a practical
3 matter, the facial constitutional challenge in that case
4 would impact the board's ability to enforce its own
5 standards.

6 So, too, here. If the Court grants our
7 request for relief, the Court would enter a declaratory
8 judgment, statute is unconstitutional, and enjoin the
9 board's -- OSHA from exercising its powers. Just because
10 there may be some collateral effect of the board's
11 injunction doesn't mean we are any different from *Free*
12 *Enterprise Fund*, because that was also true in *Free*
13 *Enterprise Fund*.

14 If you grant the request for relief in a
15 facial challenge to the statute, it will affect what OSHA
16 can do and what OSHA can enforce in the future, but it
17 doesn't change the fact that we are not challenging the
18 validity of any particular OSHA standard. We are not
19 saying OSHA made a mistake in passing that OSHA standard in
20 1980 because there was no substantial record of evidence or
21 the reasoning wasn't good enough under the APA. That's far
22 afield from the nature of this case. That's what Congress
23 wanted to channel in the Courts of Appeals where you have a
24 new standard, you know, everybody across the country is
25 affected by it, let's not have conflicting decisions by the

1 First Circuit and Third Circuit, let's put it all in one
2 Court of Appeals.

3 That's very different than the kind of case
4 you have in front of you today, which is the facial
5 challenge to the statute. There's no other case like this,
6 as far as I'm aware of, you know, pending in any federal
7 district court. So there is no concern about conflicting
8 injunctions or declaratory judgments.

9 THE COURT: Talk about *Thunder Basin*, either
10 side, if you wish to. That's question number 2.

11 MR. SHUMATE: Your Honor, *Thunder Basin* does
12 not apply for four reasons. Maybe I'll pause after each
13 reason.

14 The first is that there is no opportunity
15 for initial review by the agency. The Sixth Circuit in the
16 case called *Jones Brothers* talks about *Thunder Basin* in
17 that line of cases and says, okay, it applies in a
18 situation where a plaintiff has the opportunity to seek
19 relief administratively from the agency first where there
20 is an enforcement action like in *Thunder Basin*, like in
21 *Elgin*. And what Congress wanted is for those, you know,
22 challenges to the enforcement action to proceed through the
23 agency and then the Court of Appeals because, you know
24 what, there might be a chance you win for the agency and
25 the Court doesn't even need to address the question.

1 That's not this case for a couple of
2 reasons. The government has conceded that the enforcement
3 provision of the statute, Section 660(a), is inapplicable.
4 So we don't have the opportunity to challenge an
5 enforcement action before the OSHA review board. And
6 Section 655(f), which we've been talking about most of this
7 morning, channels cases directly in a Court of Appeals, not
8 to OSHA. So, as a threshold matter, that's a telltale sign
9 that the *Thunder Basin* line of cases doesn't apply because
10 there is no opportunity for OSHA -- sorry, for Allstates to
11 seek administrative review of its constitutional claim.

12 The second reason *Thunder Basin* doesn't
13 apply, agency expertise. For similar reasons, there is no
14 opportunity for OSHA to bring its expertise to bear on this
15 case because we can't get our claim, our constitutional
16 claim, before OSHA. There is no enforcement action, and
17 655(f) channels cases to the Courts of Appeals.

18 *Free Enterprise Fund* also says that agencies
19 don't have any expertise when it comes to administrative
20 law claims, certainly not separation of powers challenges
21 to the statute, and in the non-delegation context, agency
22 expertise is really truly irrelevant after the Supreme
23 Court's decision in *Whitman* said agencies can't narrow a
24 delegation of power from Congress because that itself is
25 the exercise of legislative power. So that's the

1 second reason.

2 The third reason *Thunder Basin* doesn't apply
3 is because our constitutional claim is wholly collateral to
4 the review scheme, which here, is embodied in two
5 provisions, 655(f) and 660(a). 655(f) doesn't apply for
6 reasons we've discussed today. We are not challenging the
7 validity of any OSHA standard, which we've discussed. And
8 second, 660(a) doesn't apply because this is not an
9 enforcement action. So our claim is wholly collateral to
10 the scheme that Congress set up that it wanted to channel a
11 type of judicial review scheme.

12 Fourth and final, we've already touched on
13 it a little bit, we would be foreclosed from bringing our
14 constitutional claim in any court if we can't bring this
15 claim before you today in this Court because *Free*
16 *Enterprise Fund* kind of rejected both of the proposals that
17 the government has made. They said we should have
18 challenged one of the standards that had been enacted over
19 the last 50 years. *Free Enterprise Fund* says that's a
20 really odd procedure for Congress to set up for a facial
21 constitutional challenge to a statute where these are the
22 type of cases that federal district courts consider all the
23 time.

24 And then second, the court said we don't --
25 plaintiff doesn't have to bet the farm and invite that

1 enforcement action to bring a constitutional claim through
2 the administrative review process. And so if we can't
3 bring this claim here, there is nowhere else Allstates can
4 go. So for those four reasons, that's why *Thunder Basin*
5 does not apply.

6 THE COURT: Does that take care of *Thunder*
7 *Basin*? Any one or more of those?

8 MR. AVALLONE: Well, Your Honor, let me take
9 a step back. I want to take a step back and say I think we
10 all agree between the parties here. We agree that district
11 courts generally have jurisdiction over federal questions.
12 And both parties appear to agree this Congress can limit or
13 channel that jurisdiction, and that's really why *Thunder*
14 *Basin* is important, because *Thunder Basin* sets out that
15 even if Congress does not explicitly set it out, if they
16 created such a comprehensive review scheme in the statute,
17 that courts should treat it as an exclusive review scheme.

18 And, in fact, most of the conversations
19 we've been having so far this morning have just assumed
20 that Section 655(f) is an exclusive review scheme. And I
21 believe that that's -- the parties agree on that, and I'm
22 sure that counsel for plaintiffs will correct me if I'm
23 wrong.

24 THE COURT: Well, let's ask. Is 655(f) a
25 comprehensive review scheme?

1 MR. SHUMATE: Yes, it is for the types of
2 claims that fall within the text of the statute and for
3 reasons we discussed. We disagree whether this claim falls
4 within that exclusive channel.

5 MR. AVALLONE: And so, Your Honor, that was
6 going to be my exact next point is that really the heart of
7 this dispute is whether this claim falls within the text of
8 that statute. And that's really why I think *Thunder Basin*
9 is important, because it sets out the principle that I
10 think that we all agree on, that 655(f) sets out and
11 excludes the review scheme.

12 THE COURT: Assume, for a moment, that I
13 decide it does not fall within subsection (f), is it okay
14 for this case to proceed before me?

15 MR. AVALLONE: Well, Your Honor, I think
16 that is -- this is the key question. Does it fall within
17 655(f). If it does, then this Court does not have
18 jurisdiction. If it falls outside, then, Your Honor, I
19 think it would fall within the 28 U.S.C. Section 1331.

20 THE COURT: Thirty-one. I thought you might
21 say that. And if it falls within that section, then what?

22 MR. AVALLONE: Well, then Your Honor would
23 have jurisdiction. So it really comes down to the text of
24 655(f). Does this type of claim fall within that?

25 THE COURT: And so to interpret 655(f), are

1 there any other subsections or other statute sections that
2 would help me understand the scope of 655(f)?

3 MR. AVALONE: Sure. I think that taking
4 the approach that as you mentioned Justice Thomas did in
5 *Elgin* is helpful. And the first place to look, as we do
6 interpreting statutes, is in the text itself. It does not
7 make any exceptions for facial constitutional challenges.
8 If you are challenging the validity of a statute, then it
9 falls within the scope of that.

10 And going back to the *Thunder Basin*, what
11 *Thunder Basin* talked about for avenues for judicial review,
12 it's whether those avenues for judicial review exist at
13 all. If, and here they do.

14 Congress has the authority to set out and
15 channel those challenges in 60 days to the Courts of
16 Appeals. If Congress had said -- and one way to think
17 about this is if you take a look at statute and took out
18 the jurisdiction stripping part of it, would this claim
19 naturally fall within the ambit of that. Any person who
20 may be adversely affected by a standard issued under this
21 section may, at any such time, challenge the validity of
22 such section and seek judicial review of such a standard.
23 If that were the statute, it would seem natural that this
24 type of claim would fall within the ambit of that.

25 And so that, really, just because Congress

1 set a time limit of 60 days and a statute of limitations
2 and a jurisdictional challenging doesn't mean it foreclosed
3 all avenues of judicial review. It gave them the judicial
4 review. Allstates decided not to take that opportunity
5 when the standard, most recent standard less than two years
6 ago -- I believe Allstates was in business then -- decided
7 not to take that opportunity.

8 THE COURT: I think what the other side
9 would say to that is we are not arguing an adverse fact or
10 review of a standard. We are arguing a standardless
11 delegation of authority from Congress to OSHA with its
12 language. And they are challenging the congressional
13 action, not the OSHA specific action. Is that a difference
14 with a distinction or not?

15 MR. AVALLONE: Your Honor, I don't believe
16 it is. And I think one way that might be helpful is
17 counsel for plaintiffs was talking about *Free Enterprise*
18 and went back to the language of the injunction of *Free*
19 *Enterprise* and it enjoined the board from exercising its
20 powers. Full stop. All of them. All of the powers. And
21 that went far beyond the ability related to a final order
22 of the commission or a rule of the commission, and that's
23 what was the exclusive regime at issue in that case.

24 Here, if Your Honor issues that injunction,
25 it's only going to affect safety standards and only the

1 specific safety standards that plaintiffs have identified.
2 It's not going to have any impact beyond those other --
3 beyond those safety standards.

4 As I mentioned before, OSHA is still going
5 to be able to conduct inspections. They are still going to
6 be able to issue citations. If Your Honor issues an
7 injunction, they just will not be able to issue citations
8 related to specific standards. And the scope of that
9 requested relief is really what brings this within that
10 language of 655(f).

11 THE COURT: Comment?

12 MR. SHUMATE: So, Your Honor, I think this
13 case is getting easier for you to decide, because I think
14 my friend is placing so much emphasis on the text of 655(f)
15 alone. And what I had taken him to be arguing is that our
16 claim falls explicitly within the terms of 655(f). You
17 should decide that question. We think we have the better
18 interpretation of the statute.

19 What I don't hear my friend arguing, at
20 least as of yet, is that our claim implicitly falls within
21 the statute and the review scheme. And the only reason
22 *Thunder Basin* would be relevant is if the government wants
23 to make an implicit argument. And so far, all I've ahead
24 is an explicit textual argument consistent with their
25 briefing that our claim falls within the explicit text of

1 655(f) .

2 If you disagree with that, you don't even
3 need to get to the *Thunder Basin* analysis, because I think
4 *Free Enterprise Fund* makes clear that there are two
5 potential arguments. There is explicit preclusion, which
6 is what the government is arguing here, or implicit
7 preclusion under *Free Enterprise* or under *Thunder Basin*.
8 And as of yet, we have not heard an argument from the
9 government that even if our claim falls outside the text of
10 the statute, the Court should nonetheless bar our claim
11 under *Thunder Basin*.

12 THE COURT: Is that what you are saying?

13 MR. AVALLONE: Your Honor, I just want to
14 clarify they use explicitly and implicitly. I think there
15 might be a bit of confusion. When we talk about *Thunder*
16 *Basin* and explicit exclusion, we are talking about when the
17 statute says use the word like "only" or the district court
18 "shall not have jurisdiction." Here, 655(f), if you take a
19 look at it, it says that a petitioner may bring a claim
20 within the Court of Appeals. It does not explicitly say
21 that this Court does not have jurisdiction.

22 Under the *Thunder Basin*, the implicit
23 jurisdictional stripping, that is what is important here
24 under this section, because if you read that 655(f), the
25 natural implication, the implicit implication is that only

1 Courts of Appeals have that authority. And so I think -- I
2 think we agree on that.

3 And the government, and please correct, the
4 government is arguing that if it falls within the text,
5 that it is -- it's part of that exclusive jurisdiction or
6 exclusive regime, if it falls outside the text, we are
7 not -- we are not saying that it falls within the exclusive
8 regime. So, once again, I think we agree on something
9 else.

10 MR. SHUMATE: So now I'm confused what the
11 government's argument is, Your Honor. I seem to have heard
12 the concession that the statute doesn't explicitly bar the
13 court from exercising jurisdiction. That's certainly good
14 news to my ears. If the statute doesn't explicitly bar our
15 claim, the court has jurisdiction under 1331. Now I seem
16 to hear an implicit argument that even if our claim
17 doesn't, you know, squarely fall within the text of the
18 statute, you should nonetheless bar our claim from court
19 because of the *Thunder Basin* factors.

20 And so we have yet to hear from the
21 government about whether those factors apply, but I've
22 heard some inconsistent -- inconsistency in the
23 government's position about whether our claim falls within
24 the square text of the statute or not, and for the reasons
25 we've discussed, we don't think our claim falls within the

1 text of the statute and that should be it.

2 THE COURT: I'm looking at the questions
3 submitted. I think we've already walked through one
4 through five, but as you take a look at those questions,
5 tell me if you have anything to add.

6 MR. SHUMATE: I think we've covered
7 everything I had intended to cover under questions one
8 through five, Your Honor.

9 THE COURT: I want to talk about the EPA
10 case, *Whitman*, which the government relies on somewhat. If
11 you've got a comment on how that case differs from this
12 case, if it does.

13 MR. SHUMATE: Your Honor, I take it you are
14 shifting to the merits?

15 THE COURT: Yes, I have. Sorry.

16 MR. SHUMATE: That's okay. Yes, so.

17 THE COURT: I thought we ought to get there
18 at some point.

19 MR. SHUMATE: Yes, so in *Whitman*, the court
20 upheld a delegation from Congress to the EPA to regulate
21 greenhouse gas emissions requisite to the public health.
22 And so we've distinguished that gram of authority from the
23 OSHA delegation in our case, because the scope of the
24 delegation to OSHA is far broader. The delegation to OSHA
25 covers all employers.

1 So the government cites to a number of cases
2 where the Supreme Court has upheld really the narrow
3 delegations to agencies with maybe some broad language like
4 public interest, but those were very targeted and specific
5 delegations to particular agencies to regulate particular
6 portions of the economy.

7 With the OSH Act, however, Congress has
8 delegated immense authority to OSHA to regulate the entire
9 national economy. All employers across the country. It
10 affects millions of employers, millions of employees across
11 the country in language that is indefinite and has no
12 intelligible principle. As we've explained, reasonably
13 necessary or appropriate can mean anything OSHA wants it to
14 mean.

15 And another important principle from
16 *Whitman*, Your Honor, to not forget, is that the court
17 cannot defer in any way or consider OSHA's attempt to
18 narrow the delegation from Congress. I think it's quite
19 telling that OSHA has recognized that there is a
20 non-delegation concern with the statute. They don't agree
21 with us on the merits, of course, but they recognize, as
22 the DC circuit has recognized and as Justice Rehnquist
23 recognized 40, 50 years ago, this is a very broad
24 delegation. And pre-*Whitman*, OSHA attempted to narrow the
25 scope of that delegation by saying we are only going to

1 apply it this way. Here's how we interpret that very broad
2 language. And the DC circuit in 1994 said that's fine.
3 *Whitman* comes along I think in 2000 and says an agency
4 cannot narrow the scope of a delegation in power because
5 that, itself, is an exercise of legislative authority. So
6 that's another reason why we think the OSHA statute is
7 broader than the EPA statute in issue in that case.

8 THE COURT: Are we delegating legislative
9 power here with OSHA and its ability to affect so many with
10 so many regulations that cover a broad scope of activity?

11 MR. AVALLONE: No, Your Honor. Before we
12 jump in here, I just want to touch back. Go back to
13 question number three.

14 THE COURT: Sure.

15 MR. AVALLONE: Before we move back onto the
16 merits.

17 THE COURT: Sure.

18 MR. AVALLONE: Your Honor, you asked
19 plaintiffs if there were any federal courts that had
20 examined the merits of a constitutional challenge to OSHA
21 and, notably, they came back with a number of cases and
22 none of those cases identified something similar here.

23 THE COURT: And you are not going to give me
24 one either, are you?

25 MR. AVALLONE: We looked, Your Honor, and we

1 have all, likewise, could not find any. So moving --

2 THE COURT: So maybe that means there is no
3 constitutional problem with OSHA?

4 MR. AVALONE: That could -- well, it could
5 mean that. Actually, if you take a look back at all the
6 other times that folks have challenged OSHA's
7 constitutionality, which, Your Honor, we have pointed out
8 in our brief has happened two times throughout history,
9 every single court has come out and said that the
10 delegation of authority was constitutional.

11 And particularly, you know, Your Honor,
12 plaintiffs spent a lot of time focusing on some old DC
13 circuit precedent where the DC circuit, at that time, was
14 applying too strict a standard for non-delegation, and the
15 Supreme Court in *Whitman* course corrected and admonished
16 the DC circuit and said you are holding the agencies to too
17 high -- too high of a level. We don't need that level of
18 technical precision that you have historically tried to
19 apply in your non-delegation doctrine cases.

20 And tellingly, after *Whitman*, after the
21 Supreme Court course corrected, the DC circuit analyzed
22 this very same question and found that, you know, we quoted
23 it a few times in our brief because it was very stark.
24 They found that one cannot plausibly argue that 29 U.S.C.
25 Section 652(8) is reasonably necessary or appropriate to

1 provide safe or healthful employment and places of
2 employment standard is not an intelligible principle.

3 So I think although *Whitman* was an important
4 case for non-delegation principles, for our purposes here,
5 because we've been talking a lot about the DC circuit
6 precedent, once *Whitman* came out and clarified exactly what
7 the standard was, the DC circuit realized that previously
8 they had been applying an incorrect standard.

9 THE COURT: So it sounds like the DC circuit
10 would disagree with your articulation that the text lacks
11 an intelligible principle?

12 MR. SHUMATE: Yes, Your Honor. The DC
13 circuit would disagree with this claim, recognize that that
14 decision is binding in the DC circuit. We don't think it's
15 even persuasive here, Your Honor. That case had I think
16 just one, maybe two paragraphs of analysis because it was
17 the last claim in the challenge to the validity of an OSHA
18 standard. And the principle arguments in that case were
19 statutory, you know, challenges to the validity of the OSHA
20 standard. And then the last claim of the case was the
21 non-delegation challenge. And the court simply cited to
22 all of the prior cases from the Supreme Court upholding
23 very broad delegations.

24 We acknowledge that that has happened
25 before. We acknowledge that this is, you know, no court

1 has ever held that the OSHA statute is a violation of the
2 non-delegation doctrine; however, a number of justices and
3 courts have recognized that this delegation is very broad
4 starting with Justice Rehnquist. Four Justices of the
5 Supreme Court currently on the court have expressed an
6 interest in reconsidering the non-delegation doctrine since
7 that DC circuit decision in 2011, and we think this is the
8 broadest delegation, broader than anything that the Supreme
9 Court has ever considered, Your Honor.

10 So we recognize that the Supreme Court has
11 upheld a number of very broad delegations since *Schechter*
12 *Poultry*, since *Panama Refining*. We think that OSHA Section
13 6(b) is much closer to the statutes at issue in *Schechter*
14 *Poultry* and *Panama Refining*, and National Industrial
15 Recovery Act, which gave the President broad authority to
16 regulate the national economy whenever he thinks it
17 appropriate. That's very similar to the broad delegation
18 to OSHA to regulate all employers in the country so long as
19 they think a safety standard is reasonably necessary or
20 prohibited. Whatever they think is good policy, OSHA can
21 do, and --

22 THE COURT: So are you quibbling with the
23 safety standard or the necessary language or both?

24 MR. SHUMATE: So we are only challenging
25 safety standards which are promulgated by OSHA under 6(b),

1 and the only intelligible principle that the government can
2 point to is the definitional provision which says
3 reasonably necessary or appropriate.

4 We have been clear that we are not
5 challenging the validity of a delegation to promulgate
6 health standards, which comes from Section (b)(5), which
7 has a different delegation of power of OSHA.

8 So the only intelligible principle the Court
9 needs to review is reasonably necessary or appropriate.
10 And as we've explained in the briefing that disjunctive is
11 important. It's "or." So even if OSHA finds that the
12 safety standard is not reasonably necessary, they can say,
13 oh, well, we still think it's appropriate, and appropriate
14 is about as broad a delegation as you can find.

15 THE COURT: Is there another case that deals
16 with the delegation with a standard of appropriate?

17 MR. SHUMATE: None comes to my mind right
18 now, Your Honor. I'm sure the government may have an
19 answer. Nothing comes to mind.

20 THE COURT: He's looking.

21 MR. AVALLONE: It's true, Your Honor. I
22 believe that we had cited to, on -- in our reply, which is
23 filed at ECF 26, page 14, we pointed to at least one
24 other -- one other provision that used that word,
25 "appropriate." And, Your Honor, we would also consider the

1 word "adequate" that was used in *Whitman* as something
2 similar to appropriate.

3 And there is, in addition to the text of the
4 statute, the Supreme Court has instructed courts, when
5 analyzing non-delegation issues, to take a look at the
6 structure and history of the act. And here, if you take a
7 look at the purpose of the act, Congress was very explicit
8 that it was concerned with personal injuries and illnesses
9 arising out of work situations. And actually, if go back
10 and you take a look back at legislative history, there is
11 an entire report where Congress was talking about how
12 industrial accidents were getting worse on a per capita
13 basis, and they considered this to be a national emergency.
14 And the purpose of the OSH Act was to, and this is in the
15 text of the statute, to assure so far as possible every
16 working man and woman in the nation safe and healthful
17 working conditions.

18 And so, Your Honor, when analyzing an
19 intelligible principle, one of the things the Court is
20 supposed to look at is the purpose of the statute.
21 Congress codified the purpose of the statute.

22 THE COURT: So you would say reasonably
23 necessary or appropriate to achieve safety and healthy
24 situations or something like that?

25 MR. AVALLONE: Well, Your Honor, just as a

1 threshold matter, we don't believe that the -- that phrase
2 reasonable and appropriate is the only intelligible
3 principle that Congress provided. That's plaintiff's
4 position. Plaintiff's position stated that only that
5 phrase, that is the only thing that you should be looking
6 at, okay.

7 Our position is that is not the only
8 intelligible principle that Congress set out. They
9 actually set out a number of them, as we laid out in our
10 brief, including the purpose.

11 And so if the Court was looking to see if a
12 standard wasn't consistent with the intelligible principle,
13 they can go back and look, and if the standard did not
14 advance the safe and healthful working conditions, it would
15 not be consistent with the intelligible principle that
16 Congress set out.

17 THE COURT: What's wrong with that
18 limitation? Doesn't that put a bit of context to what
19 might otherwise be argued is a nebulous of broad word or
20 words?

21 MR. SHUMATE: No, Your Honor. I don't think
22 it is, because the purpose of the statute just tells OSHA
23 what they can do. It doesn't limit what they can do. The
24 only limitation on that broad delegation of power to issue
25 safety standards is that they have to be reasonably

1 necessary or appropriate. But the broad delegation is to
2 promulgate safety standards to ensure, you know, safe and
3 working -- safe and healthful working conditions. That's
4 the delegation. But the only limiting principle is
5 reasonably necessary or appropriate. So I don't think the
6 purpose here helps the government.

7 THE COURT: But doesn't the delegation,
8 whatever may be necessary or appropriate, have to fall
9 within the delegation of safety and health, yes?

10 MR. SHUMATE: Yes, it has to fall generally
11 within the framework of it has to achieve safety. In fact,
12 the Supreme Court has set kind of a threshold finding that
13 OSHA has to make is that its rule will -- has to make a
14 finding that current conditions are unsafe before it
15 promulgates a safety standard. But once OSHA makes that
16 threshold finding, OSHA can do anything it wants to make
17 conditions safer so long as they are reasonably necessary
18 and appropriate. That means OSHA could bankrupt entire
19 economies, industries, and there is nothing in the
20 reasonably necessary or appropriate standard that would
21 prevent OSHA from doing that.

22 THE COURT: Tell me how it could bankrupt an
23 entire industry. Is it because of the penalty it might
24 impose or do you have another example? So if there is a
25 particular standard that OSHA believes is necessary or

1 appropriate for the health and safety of working man and
2 woman and the cost of that is enormous, it's impermissible?

3 MR. SHUMATE: We would argue, well, I don't
4 think there is any reason OSHA would say that they can --
5 let me back up. I think there could be a situation where
6 OSHA passes a standard that is so costly, so burdensome
7 that it bankrupts and puts a company like Allstates out of
8 business.

9 For example, Allstates works in high heat
10 environments. So let's say OSHA were to promulgate a new
11 standard that says employers can't have employees work in
12 environments where the temperature exceeds 90 degrees. Is
13 there anything reasonably necessary or appropriate that
14 would prevent OSHA from initiating, adopting that standard?
15 Probably not. But a standard like that would put Allstates
16 out of business because the cost of compliance would be
17 impossible. Allstates could not engage in its work. Not
18 Allstates -- OSHA has not promulgated that standard, but
19 under the government's view of the statute, they certainly
20 could, because that's -- that standard would ensure
21 employees are working in a safer environment. Less than
22 90 degrees is a lot safer than over a hundred degrees. But
23 that would severely impact Allstates' business.

24 THE COURT: They could appeal that.

25 MR. SHUMATE: In the Court of Appeals.

1 THE COURT: Right.

2 MR. SHUMATE: Right, but the argument would
3 be that OSHA exceeded its statutory authority or acted
4 arbitrarily and capriciously or there is not evidence on
5 the record and maybe Allstates wins that, but we shouldn't
6 have to wait until that rule comes down to bring our
7 constitutional claim. It should be in this Court.

8 THE COURT: Comment?

9 MR. AVALONE: Sure, Your Honor. I just
10 want to point out that there were two critical points that
11 plaintiffs made that I want to make sure I emphasize.

12 First, that the Supreme Court has already
13 found that the word "safe" in the statute requires OSHA to
14 make a threshold finding of significant risk. And that's
15 from the -- I think it's *Industrial Union Department*
16 *AFL-CIO versus American Petroleum Institute*. And that's a
17 case from 1980. So the Supreme Court has already said the
18 word "safe" requires OSHA to make a threshold finding.
19 That's one boundary on OSHA's authority.

20 The second is the reasonably necessary or
21 appropriate, the Supreme Court also held that that requires
22 technical feasibility. They can't require something that's
23 impossible.

24 And so these are the bounds that the Supreme
25 Court has already held that bind OSHA.

1 And the third point I want to make is if you
2 heard about the -- listening carefully, the hypothetical
3 harm here is that OSHA might promulgate a standard that is
4 so onerous that it could bankrupt an industry. Your Honor,
5 the way to challenge that is Section 655(f). If there is a
6 standard promulgated that is going to do something like
7 that, that is the way it challenge that. And to be clear,
8 that is not the only way that an industry can get relief.
9 They can also seek a variance.

10 So, for example, Allstates, in their papers,
11 has discussed how, in their view, they have safety
12 procedures that they think are as safe or more protective
13 of workers. There is a way that they can petition OSHA and
14 say the way that we do it is better. We would like to do
15 that and not be subject to these standards that we think
16 actually put our people at risk. There is a process for
17 that.

18 And so just to bring it all back, I think
19 that's -- those are the three main points I would make in
20 response.

21 THE COURT: I think I've run through my
22 notes. Other than maybe question six. If I have
23 jurisdiction, is there a right to an interlocutory appeal?

24 MR. SHUMATE: So no, Your Honor. If you
25 find jurisdiction, that means you've denied the

1 government's motion to dismiss. That would not be an
2 immediately appealable order. In fact, the parties have
3 crossed moved for summary judgment, so if you find
4 jurisdiction, the appropriate next step would be to address
5 the merits, as we've discussed, and grant summary judgment
6 to the plaintiff or defendant. And then enter final
7 judgment and the losing party could take an appeal to the
8 Sixth Circuit. We think that would be the most efficient
9 course here rather than having, you know, piecemeal appeals
10 on jurisdiction and potentially remand to consider the
11 merits. We would encourage the Court, in its opinion, to
12 address both the jurisdiction and the merits and the, you
13 know, losing party can take an appeal.

14 THE COURT: So is there anything further for
15 me to be educated or anything else to place on the record
16 if the summary judgment is addressed as opposed to the
17 motion to dismiss on jurisdiction?

18 MR. SHUMATE: I don't think, Your Honor, we
19 have a need for further briefing, because we both put our
20 best foot forward on the merits. We've briefed the
21 jurisdiction, merits and remedy, so the Court should enter
22 summary judgment for one party or the other. We encourage
23 the Court to enter summary judgment for us finding
24 jurisdiction, striking down the delegation, and grant --
25 finding we prevail on the merits and then granting the

1 declaratory judgment and request for an injunction that we
2 have requested.

3 THE COURT: Other than the comment about
4 finding in his favor, Zach, do you agree with the outline
5 he just proposed?

6 MR. AVALLONE: Generally, yes, Your Honor.
7 We also would just note there is a process for a certified
8 question for appeal that it might be appropriate in this
9 case. There's a number of cases that are pending before
10 the Supreme Court that address the similar questions, the
11 jurisdictional question. There is the *Cochran* case out of
12 the Fifth Circuit. There is also a case, *Axon versus the*
13 *Federal Trade Commission* out of the Ninth Circuit.

14 So is the decision of whether to seek a
15 certified interlocutory appeal for defendants, that's the
16 Solicitor General's decision, so I can't certainly say
17 whether or not we would pursue such a thing, but that would
18 be the avenue. But we agree with plaintiffs that there is
19 no right to interlocutory appeal.

20 THE COURT: Well, given the number of times
21 that Brett cited to Gorsuch, I expect that you think he
22 might be favorable to your arguments. You don't have to
23 answer.

24 MR. SHUMATE: I would hope so, Your Honor,
25 but you never know.

1 THE COURT: All right. If you have anything
2 else for me to consider, please feel free to lay it on the
3 record now. I'll give you sort of a last chance. In fact,
4 let me do this. I've done this before. Give this a couple
5 minutes of thought. I'll give each side the opportunity to
6 ask the other side a question. Give it some thought. It
7 doesn't have to be right away.

8 Ben, have you got a question you want to
9 ask? I'll include you, too, add you to the list.

10 No questions? I have one more, but I'll let
11 you go first.

12 MR. SHUMATE: I do have one, Your Honor.
13 Okay. So my question is to the government.

14 Do you concede that if the Court finds that
15 Allstates is not challenging the validity of any standard
16 under Section 655(f) that the Court has jurisdiction under
17 Section 1331?

18 MR. AVALLONE: Your Honor, I think we made
19 clear that, yes.

20 THE COURT: Yes.

21 MR. AVALLONE: We agree. If it's within the
22 text, this Court does not have jurisdiction, outside the
23 text, does not have jurisdiction.

24 Do you have any other questions?

25 MR. SHUMATE: I didn't know I could ask more

1 than one.

2 THE COURT: Don't get carried away, guys.

3 MR. AVALLONE: The question that I had was,
4 and this is for plaintiffs. If the Court enters the
5 injunction that you have requested, is there any OSHA power
6 unrelated to the power to promulgate or enforce safety
7 standards that would be enjoined?

8 MR. SHUMATE: Can you repeat the question?

9 MR. AVALLONE: Sure. If --

10 THE COURT: If the Court enters the
11 injunction that you have requested, is there any OSHA power
12 unrelated to the power to promulgate or enforce safety
13 standards that would be enjoined?

14 MR. SHUMATE: Yes. If the Court were to
15 enter the injunction that we've asked for, OSHA could not
16 promulgate new standards pursuant to Section 6(b) of the
17 OSH Act, and OSHA could not take future enforcement action
18 against Allstates and other employers for violating OSHA's
19 standards promulgated pursuant to 6(b), because we've asked
20 for an injunction of Sections 5 and 17 that would relieve
21 Allstates of having to comply with those standards and it
22 facing the penalty. So OSHA couldn't promulgate new ones
23 and they couldn't penalize Allstates for violating old
24 ones.

25 THE COURT: And it would be limited to 6(b).

1 MR. SHUMATE: Correct, Your Honor.

2 THE COURT: Meaning, what would be left?

3 Continuing that question, what's left for OSHA to do?

4 MR. SHUMATE: So there is a lot. According
5 to our research, OSHA has only used 6(b) approximately a
6 dozen times.

7 THE COURT: Right.

8 MR. SHUMATE: And I'm happy to point to
9 where those are in our complaint, but most of OSHA's safety
10 standards are national consensus standards under I think
11 65(a), those would be unaffected. Only the handful of 6(b)
12 standards that we've identified would be affected by what
13 we've requested. Nor would any health standards under
14 (b) (5). So, for example, carcinogens, things like that.

15 THE COURT: So 6(b) is not an often used
16 section by OSHA.

17 MR. SHUMATE: That's correct.

18 THE COURT: So injunction, arguably,
19 wouldn't have a significant impact.

20 MR. SHUMATE: It would have a significant
21 impact on Allstates, for sure, but it would not completely
22 gut OSHA's regulatory authority, no.

23 THE COURT: Do you find something
24 inconsistent about the request or the scope, rather, I
25 should say, of such an injunction?

1 MR. AVALLONE: Well, Your Honor, I think
2 that the scope of the injunction is a telltale sign that
3 they are challenging the validity of standards because all
4 of the -- what they are seeking to enjoin relates back to
5 either the power to promulgate standards or the power to
6 enforce standards.

7 THE COURT: Does the plaintiff have to prove
8 irreparable harm to get an injunction, and have they done
9 so here?

10 MR. AVALLONE: To -- so I think in order to
11 get an injunction --

12 THE COURT: Asking for an injunctive relief.

13 MR. AVALLONE: Yes.

14 THE COURT: Is irreparable harm a factor?

15 MR. AVALLONE: Irreparable harm is a factor,
16 Your Honor, and here, that they have -- we have not
17 contested that they have shown the harm from compliance as
18 a harm that cannot be remedied at law.

19 THE COURT: Okay.

20 MR. SHUMATE: Yes, Your Honor. In our
21 summary judgment motion, we briefed the elements of an
22 injunction and we have explained Allstates is facing
23 irreparable harm and I don't think the government responded
24 to that.

25 THE COURT: I don't think the government is

1 contesting that factor.

2 MR. AVALONE: Correct, Your Honor.

3 THE COURT: Okay. Thank you all very much.

4 This has been helpful. I appreciate your time today. And

5 we will turn to this -- I'm not going to give you a promise

6 date other than to tell you we will turn to it promptly.

7 Thank you very much. We are adjourned.

8 MR. AVALONE: Thank you very much.

9 MR. SHUMATE: Thank you, Your Honor.

10 (Proceedings adjourned at 11:29 a.m.)

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12
13 **C E R T I F I C A T E**

14
15 I, the undersigned, hereby certify
16 that the above and foregoing is a true
17 and accurate record of the proceedings
18 held in the above-entitled matter prepared
19 from my stenotype notes.

20 /s/ Diana M. Ziegelhofer____9/28/2022____
21 Diana M. Ziegelhofer, RPR, RCR
22 Official Court Reporter
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